SUPREME COURT, U. S.

No. 264

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITIONER'S REPLY TO BRIEF OF AMERICAN OIL COMPANY

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

1. Neither The Facts Of Record Or Controlling Principles Permit Application of Res Judicata or Estoppel. (Resp. Br. pp.2, 8-10)

1. Respondent argues res judicata and seeks to support the Court of Appeals estoppel ruling though the decisions

of this and other federal courts do not permit the application of either where as here

(a) the state court judgment lacked due process and was tainted with fraud (CA App. 123-130)

(b) Judge Will refused to give effect to the same judgment because of such charges and held a hearing on the facts was required (App. 22)

(c) the intervening change in the law eliminated the special injury rule underlying the state judgment (App. 36)

(d) the State hearing did not include even remote consideration or determination of the merits supporting the illegal inclusion of the terms "with prejudice" (CA Supp. Vol. I, pp. 116, 117, 146, 147, 150-160; CA App. 117, App. 24-32) and

(e) the judgment insofar as it was predicated upon multifariousness (Resp. Br. p. 8) obviously should not bar subsequent suits against any individual lessee but the absence of the right to join more than one of the 75-100 lessees deprived Illinois taxpayers of a due process remedy in the state courts and requires trial of this case in the federal courts.

a. Judge Will Recognized as Substantial Plaintiff's Claim the Same State Court Judgment Lacked Due Process and Was Tainted with Fraud.

Motions to Dismiss based upon the claim the same state court judgment was res judicata were presented in the *General Dynamics* case by Dynamics and the Sanitary District. In response to Dynamics' Motion, Petitioner filed with the District Court a seven-page motion for discovery of facts in opposition to Dynamics' Motion on the ground judgment was collusive and a fraud. This identical pleading was incorporated in the District Court record in the *Lemont* case supported by Petitioner's Affidavit. It is to

be found in the Court of Appeals Appendix and filed here (CA App. 123-130.)

Petitioner's claim the state court judgment lacked due process rested upon several factual allegations including the following:

(1) The Circuit Court chancellor, Cornelius J. Harrington, refused to disqualify himself though his son, Cornelius J. Harrington Jr., was a partner in the Kirkland firm which has consistently represented American Oil Co. in these state and federal court suits. (C.A. App. 129, Vol. I, C.A. App. Supp. 83-86).[1] The absence of impartiality is shown by his dismissal "with prejudice" though he never ruled upon or even considered any of the factual allegations in the 100 page complaint or was concerned about the vast important public issues and public losses involved in the litigation.

(2) Petitioner also contended the Sanitary District and its then president Frank Chesrow supported the corporate

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[1] In his Illinois Appellate Court Brief Petitioner relied among other things upon the following authorities *State* v. *Miller*, 94 So. 2d 661, 662 (Sup. Ct. La.) (1957); *State* v. *Deutsch*, 168 Atl. 2d 12, 233 (Sup. Ct. N.J.) (1961). There the court held:

> "Members of the present New Jersey Supreme Court have disqualified themselves whenever a close relative such as a brother or son was of counsel and they have followed the same wholesome course in instances where the close relative was a law partner of counsel appearing for a private or public litigant."

At page 23 in a footnote it states that in *Spagnuolo* v. *Barnett*, 109 A. 2d 623 (1954) Chief Justice Vanderbilt disqualified himself in a case where an attorney appeared before the Court who was a law partner of his son and he did the same in *Essex County* v. *Hundelag*, 132 A. 2d 807 (1957). See also *Oakley* v. *Aspinwall, et al.*, 3 Comst. 547, 549, 550, 1850).

defendants' motions to dismiss because Dynamics officers were engaged in a joint financial venture with Chesrow. Subsequently it appeared certain federal court records referred to in the motion it disclosed that the then key officer of Dynamics had guaranteed and in fact subsequently paid the more than $2,500,000 bank loan Chesrow and other associates had contracted to pay as principals. (CA App. 125-128)

At the time Judge Will wrote his opinion upholding federal subject matter jurisdiction 264 F.Supp. 465 (1967) (App. 10-17) Dynamics motion was before him. In view of his judgment overruling Dynamics motion to dismiss, it is obvious he did not sustain the res judicata argument. In fact when same res judicata point was presented by the Sanitary District in its motion to dismiss, Judge Will (App. 21, 22) expressly overruled it stating:

> ". . . The issue of whether plaintiff's instant action is barred by res judicata cannot be decided without a hearing on factual issues. Plaintiff claims that the state court judgment which the Sanitary District asserts bars this action was obtained by fraud. . . ." (p. 22)

b. The Intervening Illinois Supreme Court Repudiation of the Special Injury Principle Barred Application of Res Judicata or Estoppel.

This Court's landmark ruling in *C.I.R.* v. *Sunnen,* 333 U.S. 591, 597, subsequent to the decision in the *Angel* case 330 U.S. 183 expressly holds that an intervening change of legal principles prevents a federal court from giving effect to the doctrine of res adjudicata. The state's special injury rule was overruled by the Illinois Supreme Court in 1970 in *Paepcke et al.* v. *P.B.C. et al.,* 263 NE 2d 11, 18 (App. 36). (See 440 F2d 386 Fn 2 (App. pp. 2 & 36)

In *Sunner* this Court said pp. 600, 601,

> "As demonstrated by Blair v. Commissioner, 300 U.S. 5, 9, 81 L ed 465, 469, 57 S Ct. 330, a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable. But the intervening decision need not necessarily be that of a state court, as it was in the Blair Case. . . . *In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel.*" (Cases cited). (And see Petition pp. 19-22)

The Court of Appeals disregarded this Court's warning against blind adherence to estoppel (440 F2 at p. 388 App. 4)

The Kerner opinion likewise fails to even mention the fact that the Lemont suit was filed on November 20, 1968 more than nine months after the Court of Appeals on February 9, 1968 refused to order Judge Will to dismiss the Dynamics action. Plaintiff had a right to pursue his federal remedies since that Court then surely held that the federal issues were of such substance as to require a trial (App. 23). In this respect, at least, it agreed with Judge Will.

Respondent's reliance upon the July 2, 1971 *Phillips* v. *Shannon et al.* decision (pp. 9, 10) is misplaced. The Court of Appeals noted that the District Court had given effect to res judicata, but here the only District Judge who considered federal res judicata and estoppel principles was Judge Will. He overruled such contentions by defendants and held that the plaintiff's claim such judgment was a fraud and required a factual hearing. Judge Kerner did not explain his failure to even mention the prior rulings by his Court or the District Court in *General Dynamcs.*

The issue in *Phillips* was simply his right to a permit to the boat used and a particular "boat stall" and not a public action class suit. Furthermore the dismissal of his complaint by the Illinois court was not predicated on a general rule of law denying access to the Illinois courts of 99% or more of the Illinois taxpayers under a classification denying equal protection, as in this case.

The effort of American Oil to resurrect res judicata and support the Court of Appeals estoppel ruling is in direct conflict with the principles of abstention, equitable estoppel and res judicata as consistently applied by the federal courts. The emphasis now placed by this Respondent upon the Circuit Court decree dismissal "with prejudice" supports Petitioner's claim that Judge Harrington was unfit to hear plaintiff's state court suit because of his divided loyalty between the public and the Kirkland firm in which his son was a partner. Moreover, the federal courts will not permit expansion of a jurisdictional dismissal decree without a determination of whether the merits were in fact decided.

The Circuit Court ignored Petitioner's arguments that federal constitutional law forbids res judicata effect to a class action judgment unless the trial court proceedings and judgment fully comply with procedural due process. *Hansberry* v. *Lee*, 311 US 32, 41; *Mullane* v. *Central Hanover Bank*, 339 US 306, 313. See also *Acre* v. *Air Line Pilots Assc.*, 390 F.2d 199, 203 (1968) C.A. 5 (1968). *Gart* v. *Cole*, 263 F.2d 244, 249, C.A. 2, 1959. The judgment below should be reversed.

A. Respondent Claims No Substantial Federal Question Arises Under Illinois Law (Resp. pp. 2, 3)

Respondent argued the special injury rule limitation of enforcement of public rights to those suffering private injury and certain public officials served a legitimate state purpose. In practice it perpetuated fraudulent grants of public property for when the Illinois Supreme Court in 1970 repudiated special injury classification, it declared "to tell them (taxpayers) they must wait upon government action is often an effectual denial of the right for all time." *Paepcke et al.* v. *P.B.C. et al.*, 263 NE 2d 11, 18 (App. 36). The District Court opinion now relied upon by Respondent was predicated upon a novel principle that the special injury rule must be preserved for to apply the Fourteenth Amendment to it would mean the Illinois citizens would burden Illinois courts with "remote tax payers complaints without limitation" (App. 9, 304 F. Supp. 235, 237).

This unique view demonstrates the District Court's holding is wholly inconsistent with long established state and federal principles. (See Petition pp. 15-28) (App. 10-17, 21, 22, 69-72) Neither its judgment and opinion, nor Respondents briefs, its exclusive source, are a proper guide to the determination of federal constitutional and jurisdictional rights.

B. Respondent Errs in Its Claim No Federal Question Existed (Resp. pp. 4, 5)

Respondent after disregarding the substantial independent jurisdictional claims of denial of due process and equal protection misapplies *Owensboro Waterworks Co.*, 200 U.S. 38. There the city proposed to issue bonds to defray the cost of constructing its own water plant to be operated in competition with the plaintiff's privately operated company. The latter, seeking to enforce its claimed

monopoly rights, filed suit in the federal courts to enjoin the city from issuing bonds to build such municipal plant.

It is obvious that the facts and ruling can have no application here for plaintiff instituted this action because American Oil and other District corporate lessees had wrongfully converted public properties into private property. In *Owensboro* the water company sought to prevent the use of municipal funds to be used by a municipal corporation for public purposes. No questions of wrongful conversion of public property into private property was at issue in that case. Here plaintiff was asserting his property rights to recover public property which now had all the attributes of private property including the protection the law affords private persons who have acquired public property providing such acquisitions unlike the instant situation are not tainted with fraud.

This suit involves more than the recovery of equitable interest in public property, adequate and lawful rentals, and accounting for it seeks to recover large areas of land illegally held by the lessees. (C.A. App. pp. 28, 29, 35, par. 8, p. 42 K)

The property interest of taxpayers in such public property converted to private property is conclusively established. (Petition pp. 24-25, App. 69-72). Judge Will's opinion states such interest was recognized under Illinois law for all such taxpayers' actions were predicated upon equitable interest in property (264 F. Supp. at p. 469, App. 14). The interest is further approved in the *Paepcke* case upholding such taxpayers' actions (App. 36, 267 N.E. 2d, 11, 18).

This case does not present issues of illegal expenditures of public funds such as was presented in *Otto* v. *Sommers*, 332 F. 2nd 697. The attack upon the leasing procedures is simply incidental to the wrongful seizure of public property by the corporate defendants.

C. The Claim the Jurisdictional Amount Required under 28 U.S.C. 1331 Is Not Present (Resp. pp. 6, 7)

This Respondent relies upon the cursory disposition by the District Court of this issue (App. 9, 304 F. Supp. 235, 237). Though this Court stated that under *Snyder* v. *Harris*, 394 U.S. 332, class action claims could be aggregated if they were traditionally considered to be a joint and common claim it made no effort to determine the nature of plaintiff's claim. Furthermore, it disregarded Judge Will's unreported opinion of April 6, 1967 (App. 18-20) when he concluded "the property right asserted by plaintiff is held in common by all members of the class" (p. 20). Here he was attempting to recover not merely equitable interests in property for the class but the physical property itself which he claimed had been fraudulently taken from the District. None of the cases relied upon by this Respondent presented the character of traditional common claims represented in plaintiff's pleadings.

D. Respondent errs in arguing There Is No Federal Jurisdiction Under 28 U.S.C. 1343(3) (Resp. p. 7).

The contention of this Respondent disregards Petitioner's claims he was denied both procedural due process and equal protection of the laws. We refer to our original Petition (pages 15-19) as representing a complete answer to Respondent's argument.

Conclusion

An examination of the briefs filed in the Court of Appeals discloses the Kerner opinion is simply a cursory summary of defendants' briefs and disregards the function imposed upon all federal courts to independently explore and fairly determine constitutional and jurisdictional prin-

ciples. An explanation may well lie in the claims of Petitioner that his class were deprived of a due process hearing by Judge Kerner's participation. The people of this nation are accustomed to a good more from the federal courts. The District's citizens and taxpayers only remaining hope lies in the hands of this Court.

The Petition should be allowed and the judgments below reversed.

Respectfully submitted,

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